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No. 94-229

In The

Supreme Court of the United States

October Term, 1994

STEVEN D. FREDERICK,

Petitioner,

vs.

JOHN STEPANIK, Superintendent, State Correctional Institution at Dallas, PA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner's Sixth Amendment right to effective assistance of counsel was violated when trial counsel did not move to suppress the testimony of two prosecution witnesses at trial?

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STATEMENT OF THE CASE

On February 12, 1975, Doreme Kunkel was found dead in her home. She had been stabbed over thirty times. On February 14, 1975, the police spoke with Steven Frederick as a witness with regard to the actions of Roger Kunkel, the victim's son, on February 11th and 12th. After polygraph examinations were

administered to relatives and acquaintances of the victim, including Frederick, on the 18th and 19th of February, Frederick became a suspect in the murder.

On March 5, 1975, Frederick was incarcerated at Berks County Prison for a parole violation. Within a week of his incarceration, Frederick had his first conversation with Arlan Schaedler. Schaedler was also incarcerated in Berks County Prison, charged with driving his mother-in-law's car without her consent and theft by deception of that car. Schaedler was a "jailhouse lawyer" who assisted other inmates with their legal questions. Schaedler had spent thirty years in penal institutions.

On March 20, 1975, Frederick asked Schaedler to help him file a motion to get him committed to Wernersville State Hospital. Schaedler asked Frederick questions about why he wanted to get committed and Frederick told him that he was involved in a murder of a woman in a trailer park. Frederick told Schaedler that he had stabbed a woman thirty some times and robbed her. Schaedler made notes of this conversation.

On March 21, 1975, Lieutenant Donald Holloway of the Pennsylvania State Police interviewed Schaedler with regard to an armed robbery investigation. Schaedler advised Holloway that he had information about Frederick's involvement in the Kunkel murder. Holloway came back to the prison that night and Schaedler gave him the notes he had made on the 20th. Subsequently, Schaedler made notes of conversations that he had with Frederick on six other occasions. Schaedler sent all of these notes either to the warden or gave them to Holloway. Included with Schaedler's notes was a drawing by Frederick showing where he disposed of the box he took from the victim's home.

On April 2, 1975, Trooper Robert Sease prepared an arrest warrant for Frederick for the murder of Doreme Kunkel, the

probable cause for which was based in part on Frederick's admissions to Schaedler. Since Schaedler was going to be a witness in the Frederick murder case, Sease requested that Frederick be transferred to Schuylkill County Prison when the arrest warrant was served on him in Berks County Prison so that he would be separated from Schaedler. On April 5, 1975, Frederick was arrested and transferred as Sease had requested. At some time on that same day, Schaedler's mother-in-law dropped the charges against him and he was released from Berks County Prison.

In March of 1975, Holloway was called to the Spring Township Police Department by the police chief to talk with Edward Klusewitz regarding burglaries to which he had confessed. After speaking with Klusewitz as to the locations of the burglaries, Holloway realized that they did not occur within areas where the investigations are conducted by the State Police. Neither Klusewitz nor Holloway spoke of the Frederick case.

Klusewitz was incarcerated in Schuylkill County Prison in a cell near Frederick's cell. On April 10, 1975, after Klusewitz returned from a court appearance in Berks County, Frederick approached Klusewitz and asked if he had heard anything about him in the courthouse. Klusewitz kept notes of his conversations with Frederick on April 10, 11, 23 and 25, 1975, which he turned over to the prison warden, who then sent them to the State Police. Although these conversations with Frederick touch on details about the murder and the investigations, Frederick never told Klusewitz that he had stabbed Mrs. Kunkel.

Schaedler and Klusewitz both testified at Frederick's trial in May 1977. Schaedler testified that he had not been promised, nor had he received, any favors in return for his testimony and that the state police had never gotten him off any charges as a result of his cooperation. He was not imprisoned nor did he have pending charges in May 1977. Klusewitz testified that he had not been

promised, nor had he received any favors as a result of his cooperation in the Frederick's trial. Klusewitz had been released from jail on December 6, 1976, after serving the one and a half year minimum on his burglary convictions.

On May 23, 1977, the jury convicted Frederick, *inter alia*, of first degree murder. On January 3, 1980, the Honorable Warren K. Hess, the trial judge, held an evidentiary hearing on post trial motions, which were denied in an Order and Opinion dated March 5, 1980. He was sentenced to life imprisonment on June 5, 1980. His direct appeal was denied by the Supreme Court of Pennsylvania *per curiam* on May 27, 1983.

On February 2, 1988, Frederick, through counsel, filed a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"). The PCRA Petition raised *inter alia* the issue of after-discovered evidence in the form of recantation testimony of Schaedler and Klusewitz. On February 27, 1989, counsel filed a Supplemental PCRA Petition in which he alleged that Schaedler and Klusewitz were both acting as police agents at the time of their contacts with Frederick in prison and that trial counsel was ineffective for not moving to suppress the testimony of Schaedler and Klusewitz.

At the PCRA hearing, Klusewitz recanted his trial testimony. Schaedler did not testify at the hearing, although counsel introduced an undated, unauthenticated letter which was purported to be a letter from Schaedler to Frederick which allegedly recanted his trial testimony. Although Klusewitz could not identify with any certainty his own writing on the documents which were introduced as letters from Klusewitz to the Attorney General's Office, Klusewitz testified that the signature on the "Schaedler" letter as that of Arlan Schaedler.

The Honorable Thomas J. Eshelman denied the PCRA

Petition. Judge Eshelman found Klusewitz's recantation testimony to be incredible. He wrote that "we were not at all satisfied with the truthfulness of the testimony." On appeal, the Superior Court of Pennsylvania affirmed the PCRA court, concluding that the PCRA court did not abuse its discretion in resolving the issue of credibility in favor of Klusewitz's trial testimony and against his recantation testimony. The Superior Court also found that previous counsel were not ineffective with regard to the issue of the suppression of Schaedler and Klusewitz's testimony based on their being police agents since the only evidence that those witnesses were police informants was in the rejected recantation testimony of Klusewitz. On February 14, 1992, the Supreme Court of Pennsylvania affirmed the Superior Court *per curiam*. *Commonwealth v. Frederick*, 601 A.2d 807 (Pa. 1992).

On September 10, 1992, Frederick filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. He requested relief *inter alia* on the grounds that trial counsel was ineffective for not attempting to suppress the testimony of the "jailhouse informants", Schaedler and Klusewitz, who were acting as police agents in contacting Frederick, and that appellate counsel was ineffective for not raising the error on appeal. Magistrate Judge James R. Melinson recommended that the petition be denied and dismissed without an evidentiary hearing.

In his Report and Recommendation, Judge Melinson found that neither trial nor appellate counsel possessed any evidence on which to move to suppress the testimony of Schaedler and Klusewitz so that any objection at trial or argument on appeal would have been meritless. The Court gave the PCRA court's finding, which was reached after a full evidentiary hearing, that the evidence presented by the recantation testimony and letters were not credible, a presumption of correctness. Since the evidence that Klusewitz and Schaedler were police agents was unreliable, the

admission of the testimony of the two witnesses at trial did not prejudice Frederick. Therefore, even if counsel's actions were deficient in not filing for suppression of the testimony, Frederick could not satisfy the prejudice prong of the test for his ineffectiveness claim.

Frederick filed Objections to the Report and Recommendation. On or about February 8, 1993, Senior Judge E. Mac Troutman overruled the Objections, approved and adopted the Report and Recommendations, denied and dismissed the petition and found no probable cause for appeal. On or about October 26, 1993, the United States Court of Appeals for the Third Circuit granted Frederick's request for a certificate of probable cause. In a Judgment Order dated May 5, 1994, issued by Chief Judge Sloviter and Circuit Judges Hutchinson and Seitz, the Third Circuit Court of Appeals affirmed the judgment of the district court, finding that the district court did not err in not affording petitioner an evidentiary hearing and that the state record did not show a constitutional violation.

REASONS FOR DENYING THE WRIT

The instant petition fails to show any error in the decision of the Third Circuit Court of Appeals affirming the judgment of the District Court. All the courts below properly followed and applied the law to the facts of record in this case. Petitioner has failed to show any decision rendered by any court which conflicts with the outcome in this case. Instead, petitioner relies on misstatement of the record facts and on recantation testimony which was specifically rejected by the state court as incredible to support his claim that two witnesses were jailhouse informants. The actual record reveals no evidence that either witness acted as a police agent. The only issue which petitioner has exhausted is a claim of ineffectiveness of counsel with regard to trial counsel's failure to file a suppression motion as to the testimony of these two

witnesses. Since this missing police agency is essential to the ineffective assistance of counsel claim, petitioner is unable to meet his burden in showing ineffectiveness. In fact, he cannot show a violation of any of his constitutional rights. Petitioner is also, on the actual facts of this case, unable to support his argument of an important public policy consideration to extend the present Sixth Amendment right to counsel to pre-arrest situations where a police agent elicits a confession from a defendant who is incarcerated on other charges. Thus, petitioner having failed to present any special or important reasons for review, the writ should be denied.

ARGUMENT

Frederick contends that his conviction was obtained through incriminating statements extracted deliberately by two police agents while he was incarcerated. Throughout this habeas proceeding, Frederick has presented this issue as a claim of ineffectiveness of counsel for failing to move to suppress the testimony of these two witnesses, since that is the claim which he exhausted in the state court system. Essential to his claim of ineffectiveness is evidence that the two witnesses were police agents. The record in this case does not supply that evidence.

Therefore, throughout the proceedings in this case, Frederick has consistently relied on an offer of proof by the prosecuting attorney at trial, misstatement of the facts of record and rejected recantation testimony to make his argument. After examining the actual record in the case, each court has found that Frederick's claim is meritless. He cannot meet his burden in showing that counsel was ineffective for failing to move to suppress evidence when there was and still is no evidence in the actual record to show that the two witnesses were police agents. Simply put, the constitutional issues for which petitioner seeks review are absent on the facts of this record.

A. Arlan Schaedler

The first witness whose testimony Frederick claims should have been suppressed because he was an agent of the police is Arlan Schaedler. First of all, all of Schaedler's contact with Frederick occurred before he was arrested for the murder of Doreme Kunkel. Therefore, the present state of the law is that Frederick had no Sixth Amendment right to counsel at the time of those conversations. Furthermore, although Frederick urges this Honorable Court to extend that right to counsel to cover pre-arrest situations when a police agent obtains a confession from a defendant incarcerated on other charges, Frederick can only present facts unsubstantiated in the record and an offer of proof by the prosecuting attorney as evidence that Schaedler was a police agent. Without the police agency, Frederick's trial counsel had no basis to move to suppress Schaedler's testimony.

The law available to trial counsel with regard to Schaedler's testimony was the same as it is today. The Sixth Amendment right to counsel is offense-specific and "does not attach until a prosecution is commenced . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *McNeil v. Wisconsin,* 501 U.S. 171, ___, 115 L. Ed. 2d 158, 166-167 (1991), *quoting United States v. Gouvela,* 467 U.S. 180, 188, 81 L. Ed. 2d 146, ___ (1984), *quoting Kirby v. Illinois,* 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972) (plurality opinion). Furthermore, this Honorable Court has stated that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Maine v. Moulton,* 474 U.S. 159, 180, n. 16, 88 L. Ed. 2d 281, 499, n. 16 (1985).

Clearly, in the case *sub judice,* all of the conversations with Frederick to which Schaedler testified at trial occurred before Frederick was charged with the murder of Mrs. Kunkel. The last conversation to which Schaedler testified occurred on April 3,

1975; Frederick was arrested on the instant charges on April 5, 1975. Therefore, under the law, both now and in 1975, trial counsel had no basis to move to suppress Schaedler's testimony on Sixth Amendment grounds since Frederick was not charged *even if* the police asked Schaedler to talk to Frederick. However, the facts of record show that Frederick approached Schaedler, who then approached the police.

Frederick has consistently stated throughout these post-conviction proceedings that Lieutenant Holloway met with Arlan Schaedler on March 20, 1975, at Berks County Prison and instructed Schaedler to obtain evidence linking Frederick to the murder of Mrs. Kunkel. Yet, Schaedler's testimony at trial was that Frederick approached him on March 20, 1975, and asked him for legal assistance. Schaedler's note dated March 20, 1975, in which he recorded the conversation with Frederick, states the same facts. Schaedler testified that he told Lieutenant Holloway the following day, which would have been the 21st, that he had information on the murder.

The only other testimony as to Lieutenant Holloway's initial contact with Schaedler occurred nearly fourteen years later at Frederick's PCRA hearing. Lieutenant Holloway testified that, although he no longer knew the date of his first contact with Schaedler, Schaedler advised him at that first meeting that he had information about the murder. Holloway testified that he never asked Schaedler to talk to Frederick and that he never gave him information about the murder. He stated that he might have suggested some things to Schaedler to determine whether Schaedler was telling the truth but not questions to ask Frederick.

Frederick relies solely on an offer of proof at trial by the prosecuting attorney as evidence that Holloway met with Schaedler on March 20, 1975. He is unable to show any testimony by either Schaedler or Holloway, the participants in the meeting, to

that effect. Although there was an offer of proof as to Holloway's potential testimony, Holloway did not, in fact, testify at trial. The prosecuting attorney's offer of proof was merely what the attorney thought his witness would say. In fact, the offer does not allege that Holloway used Schaedler as an informant. It basically states the same facts to which Holloway testified fourteen years later: that at the first meeting Schaedler advised Holloway that he had information regarding the Kunkel murder and that Holloway tested Schaedler's credibility.

Frederick has also consistently insisted to the courts that Schedler acted as a professional snitch, exchanging confessions he elicited from other inmates for leniency on his own charges. The record does not support this allegation. Schaedler testified that by the time of trial he had spent thirty years in penal institutions. He was fifty-six years old. If he was cooperating in order to get deals for himself, he was not getting very good deals. He admitted to one instance of cooperation with the police in an armed robbery case since Holloway had interrogated him on those charges. He denied that he was receiving any consideration for testifying against Frederick.

Schaedler's denial of consideration for his testimony is amply supported in the record. At the time he first approached Holloway, Schaedler was imprisoned on charges for which his mother-in-law was the victim. She chose to drop those charges on April 5, 1975, and Schaedler was released from custody. At the time of Frederick's trial, two years later, Schaedler was not in prison and had no pending charges. Therefore, the state, even if it had wanted to so ensure Schaedler's testimony, had nothing on which to grant Schaedler leniency.

In order to show a violation of his right to counsel, Frederick "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to

elicit incriminating remarks." *Kuhlman v. Wilson,* 477 U.S. 436, 459, 91 L. Ed. 2d 364, 384-385 (1986). This record shows that Frederick approached Schaedler for legal assistance before Frederick was arrested for the murder of Doreme Kunkel. When Schaedler asked questions about the basis for this assistance, Frederick made admissions about the murder. Schaedler then turned this information over to the police. Schaedler did not and could not have received any leniency for this information or his subsequent testimony.

Although Frederick claims that he does not rely on the PCRA recantation testimony of Edward Klusewitz, which was firmly rejected as incredible by the PCRA court, he refers to that testimony in his petition to this Honorable Court. He specifically states: "Mr. Klusewitz also testified that Mr. Schaedler told him, in a *holding cell* at Petitioner's trial, that Mr. Schaedler's testimony was untruthful and *was intended to secure a more lenient sentence."* (Petition, p. 12) (*emphasis added*). Frederick's exaggeration of the record is apparent in this statement. Since neither Schaedler nor Klusewitz was in prison at the time of Frederick's trial, they certainly were not kept in a holding cell at the time of the trial. In fact, Klusewitz testified at the PCRA hearing that he and Schaedler, along with some state police, were in a room where they kept the witnesses. Furthermore, as already stated, there were no charges for which Schaedler could be seeking a more lenient sentence.

Frederick later in his Petition urges this Honorable Court to *keep in mind* that Klusewitz "has recanted his confession, admitting that he and Schaedler had lied at Petitioner's trial." (Petition, p. 42). These facts should not be *kept in mind* or relied upon, since the state court firmly found as fact that Klusewitz's recantation testimony was incredible.

Frederick also alleges that Frederick was repeatedly

questioned by the police, especially Lieutenant Holloway. (Petition, p. 5). This allegation is unsupported in the record. The only contact between Frederick and the police shown in the record is that Frederick was questioned once as a witness as to the actions of the victim's son around the time of the murder. He then, along with many other witnesses, took a polygraph test. Neither of these police contacts were conducted by Lieutenant Holloway.

Another misrepresentation of record fact in the instant petition is Frederick's allegation that Trooper Sease knew that Schaedler was released on April 5, 1975, and that he knew there was no reason, therefore, to send Frederick to Schuylkill County Prison. (Petition, p. 11; pp. 36-37). Trooper Sease testified that the arrangements for the transfer had to be made through the court before Frederick was arrested. Trooper Sease testified that he had no knowledge that Schaedler was going to be released.

This record is simply devoid of any evidence that Arlan Schaedler acted as a police agent. Without that agency, there is no factual basis for his constitutional ineffectiveness claim or for his argument that the law as to confessions obtained by police agents be extended to cover a pre-arrest situation.

B. Edward Klusewitz

Frederick also contends that another Commonwealth witness, Edward Klusewitz, was recruited by Lieutenant Holloway to obtain incriminating statements from him after his arrest in violation of his Sixth Amendment right to counsel. Neither the law nor the record supports this claim.

"The primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlman v. Wilson, supra,* at 459, 91 L. Ed. 2d at 384. This Honorable Court went on to say:

> . . . Since "the Sixth Amendment is not violated whenever — by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached," . . . a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, *the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.*

Id. (citations omitted) (emphasis added).

If a state post-conviction hearing is full, fair and adequate and comports with due process standards, then the state court's credibility finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). It is Frederick's burden to establish by convincing evidence that the factual determination made by the state court was erroneous. In the instant case, Frederick makes no assertions that the PCRA evidentiary hearing was inadequate. In fact, he does not even claim that the PCRA court's credibility finding as to Klusewitz is not supported by the record. Therefore, the district court properly gave a presumption of correctness to the PCRA court's finding that the evidence presented by Klusewitz's testimony and letters was incredible.

The Commonwealth agrees that Frederick was charged with murder at the time of his conversations with Klusewitz. That fact alone is insufficient to establish a Sixth Amendment violation. Without the rejected Klusewitz testimony and letters, this record is devoid of any evidence which would demonstrate that Klusewitz was a police agent.

Frederick claims, as he did with regard to Schaedler's testimony, that Klusewitz is simply lying and that Frederick never made the statements to which Klusewitz testified. Frederick supplies no evidence that Klusewitz took any action to deliberately elicit incriminating remarks. He simply says that Klusewitz lied.

Since the Sixth Amendment is not violated whenever the State obtains incriminating statements from an accused after the right to counsel has attached, Frederick must show more than that he was under arrest when the statements were made. He must show that Klusewitz and the police took some action, beyond merely listening that deliberately elicited the incriminating remarks. *Kuhlmann v. Wilson, supra.* Since Klusewitz's testimony and letters were rejected as incredible by the PCRA court, Frederick's evidence must come from somewhere else in the record.

Although Frederick contends that he does not rely on the PCRA testimony to show that Klusewitz was a police agent, he relies heavily on that testimony throughout his petition before this Honorable Court. Without the facts which are only present in this record in Klusewitz's PCRA testimony, the evidence of Klusewitz's "police-agent status" is reduced to the facts that Lieutenant Holloway spoke with Klusewitz in Spring Township in March, 1975, and that Frederick was transferred to Schuylkill County Prison after his arrest on April 5, 1975. Thereafter, Frederick spoke with Klusewitz who documented the conversations and forwarded the information to the Pennsylvania State Police. The existing record clearly rebuts any inference, if there is one, arising from Holloway's meeting with Klusewitz and establishes that Klusewitz's trial testimony was not obtained in violation of Frederick's rights.

At the PCRA hearing, Holloway testified that he was called by the Spring Township police chief to speak with Klusewitz about burglaries to which he had confessed. At trial, Klusewitz testified

that in 1975 he had eleven burglaries to which he pled guilty. Since Klusewitz was giving statements about the other participants in the burglaries who were likely incarcerated at Berks County Prison, it makes sense that he was housed in Schuylkill County Prison and brought down to Spring Township rather than Berks County Prison when he came to court. Holloway testified that, when he realized that none of the burglaries were in the area where the investigations were handled by the State Police, he left. Holloway stated that he did not discuss the Frederick case with Klusewitz.

Klusewitz testified at trial that he had not been promised, nor did he receive, any favors for his testimony against Frederick. Holloway testified at the PCRA hearing that he never promised Klusewitz anything and that he never spoke at any sentencing hearing for Klusewitz. He also testified that he had no part in arranging for Frederick's transfer to Schuylkill County Prison. At the time of his trial testimony, Klusewitz had finished serving his prison sentence on the 1975 burglary charges and had no pending charges.

Trooper Sease explained at the PCRA hearing that arrangements were made on April 2, 1975, to send Frederick to Schuylkill County Prison in order to keep him and Schaedler separated. Sease had no knowledge on April 2 that Schaedler's mother-in-law would drop the pending charges against him allowing him to be released from Berks County Prison.

Klusewitz's first note reflecting a conversation with Frederick was dated April 10, 1975. The note indicates that Frederick approached Klusewitz on Klusewitz's return from a court appearance. Frederick asked Klusewitz if he heard anything about Frederick's case. In the course of that conversation, Frederick offered information about the box for which the police were looking and Frederick's need for an alibi between 1:30 and 5:00 a.m. Although the record is not clear on when Klusewitz first

contacted the State Police, Holloway testified that Klusewitz said that he already had information about the murder when he contacted them. Klusewitz then forwarded his notes recording the conversations with Frederick to the State Police.

The only evidence which contradicts the above facts is the Klusewitz PCRA testimony which was found incredible. Frederick, although claiming that he does not rely on the rejected testimony, colors the above facts of record by peppering his petition with references to facts which only exist in Klusewitz's PCRA testimony. (*See* Petition, p. 10; 12-16; 34-37; 42). The actual facts of record fail to demonstrate that the police and Klusewitz took any action, beyond merely listening, that was designed to elicit incriminating remarks from Frederick. Petitioner cannot thereby demonstrate a violation of his right to counsel.

A state is not required to ignore all incriminating statements made by a defendant after he has been charged with a crime. They are simply not permitted to deliberately elicit such remarks outside the presence of counsel after his right to counsel has attached. The record here shows no attempt by the police to recruit Klusewitz as a police agent. Klusewitz contacted Holloway to advise him that he had information about the murder. Holloway never communicated with Klusewitz and asked him to get more information. Klusewitz was not paid nor did he receive any other consideration for his testimony. Trial counsel had no basis to file a suppression motion as to Klusewitz's testimony and he can not be found ineffective for failing to take a meritless action.

Even assuming for the sake of argument that at some point Klusewitz became a police agent, this agency could not have occurred before the police became aware of Klusewitz's conversation with Frederick. This record shows that the police were not aware of Klusewitz's actions until he contacted them and advised them that he had information about the murder. This

contact necessarily would have occurred after his first conversation with Frederick which is documented in the first note as April 10, 1975. Therefore, the first note and testimony regarding the April 10th conversation would have been admissible at the very least against Frederick.

Even if the subsequent notes were held inadmissible, any error in their admission at trial would have been harmless for two reasons. First, the notes and Klusewitz's testimony contain no confession by Frederick that he killed Doreme Kunkel. Even Frederick admitted at the PCRA hearing that Klusewitz's testimony did not hurt him that much, Secondly, the information contained in the notes is mainly cumulative of the testimony of Arlan Schaedler, which would have been admissible at trial. For these reasons, even if the notes after April 10th had been suppressed, there is not a reasonable probability that the result of the proceeding would have been different. Therefore, Frederick cannot show the prejudice required by the *Strickland* test with regard to the admission of Klusewitz's trial testimony. *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

SUMMARY OF ARGUMENT

Frederick has failed to show a violation of his Sixth Amendment right to effective assistance of counsel. The only fact which Frederick had alleged in his Writ of Habeas Corpus which, if proven, might have warranted relief was his claim that Klusewitz was recruited by Lieutenant Holloway in March, 1975, to obtain incriminating statements from Frederick after his right to counsel had attached with his arrest on the murder charge. That fact, however, was presented through Klusewitz's testimony and letters to the state post conviction court in a full evidentiary hearing. The state court found that evidence to be incredible. The Superior Court of Pennsylvania found on appeal that essential to Frederick's argument that counsel was ineffective for failing to move to

suppress Schaedler's and Klusewitz's testimony is the allegation that they were acting as police agents. Since that allegation was made out only if Klusewitz's testimony was believed, the finding by the PCRA court that Klusewitz's testimony was incredible rendered Frederick's claim meritless. The record supports both findings.

Since the finding of the PCRA court as to Klusewitz's credibility is entitled to a presumption of correctness under 28 U.S.C. § 2254(d), the District Court properly denied and dismissed Frederick's petition without an evidentiary hearing. Since the record clearly shows that the truth of his allegations were already determined, the Third Circuit Court of Appeals properly found no error in not affording Frederick a separate evidentiary hearing and in affirming the judgment of the district court because the record fails to show a constitutional violation.

The decision of the Third Circuit Court of Appeals is not in conflict with any decisions of this Court, other decisions of the Third Circuit Court or decisions of other Circuit Courts. The courts below have properly applied the law to the facts as they exist in the actual record. Frederick's argument necessarily require this Court to ignore or overturn the factual determinations made in the lower courts. Since those factual determinations are entitled to a presumption of correctness, Frederick's original petition failed to state a claim which warranted relief. *See Kuhlmann v. Wilson, supra.* Likewise, this petition fails to state a claim which warrants review and should be denied.

CONCLUSION

Accordingly, for all the foregoing reasons, petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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